STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Patrick M. Meter, Colleen A. O'Brien, and Brock A. Swartzle

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

Supreme Court No. _____

Court of Appeals No. 344715

Circuit Court No. 17-016798-NF

_____/

SECREST WARDLE
NATHAN J. EDMONDS (P 51453)
DREW W. BROADDUS (P 64658)
Attorneys for Plaintiff-Appellant
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966 / Fax (248) 251-1829
dbroaddus@secrestwardle.com

ANSELMI MIERZEJEWSKI RUTH & SOWLE, P.C.
MICHAEL PHILLIPS (P 73280)
Attorney for Defendants-Appellees
1750 S. Telegraph Road, Suite 306
Bloomfield Hills, MI 48302-0179
(248) 338-2290 / Fax (248) 338-4451
mphillips@a-mlaw.com

_____/

PLAINTIFF-APPELLANT ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY'S APPLICATION FOR LEAVE TO APPEAL

SECREST WARDLE

BY: DREW W. BROADDUS (P 64658)
Attorney for Plaintiff-Appellant Esurance
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966 / FAX (248) 251-1829

Dated: November 26, 2019

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

COURT RULES

MISCELLANEOUS

STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellant Esurance Property and Casualty Insurance Company ("Esurance") seeks leave to appeal from the decision of the Court of Appeals (Ex. 1) which affirmed the Wayne County Circuit Court's dismissal of this equitable subrogation suit. *Esurance v MAIPF*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2019 (Docket No. 344715). The trial court granted the Motion for Summary Disposition brought by Defendants-Appellees Michigan Assigned Claims Plan and Michigan Automobile Insurance Placement Facility's (hereinafter collectively "MAIPF") under MCR 2.116(C)(8). (Ex. 1, p 1.)

This Court should review this case because, as the MAIPF stated in its Request for Publication in the Court of Appeals, the decision presents "a legal issue of significant public interest," and "establishes a critical new rule of law." (Ex. 2, pp 1-2.) However, Esurance believes that the reasons why are different from those identified by the MAIPF. That the Court of Appeals' reasoning threatens to undermine the very use of equitable subrogation in the no-fault context. Equitable subrogation plays a critical role in furthering "the no-fault act's purpose of providing assured, adequate, and prompt recovery…." *St John Macomb-Oakland Hosp v State Farm Mut Auto Ins Co*, 318 Mich App 256, 267; 896 NW2d 85 (2016).

For decades the Court of Appeals has directed no-fault carriers to pay claims first and sort out priority issues between carriers later – with the assurance that erroneous payments could be recovered from a higher-in-priority carrier through equitable subrogation. See *Allstate Ins Co v Citizens Ins Co of Am*, 118 Mich App 594, 603-604; 325 NW2d 505 (1982) ("whenever a priority question arises between two insurers, the preferred method of resolution is for one of the insurers to pay the claim and sue the other in an action of subrogation"). This has been the mechanism through which insurers who are presented with claims, but might not be the

responsible carrier, could avoid 12% penalty interest under MCL 500.3142(4) and attorney fees under MCL 500.3148(1). See *U of M Regents v State Farm,* 250 Mich App 719, 737; 650 NW2d 129 (2002) ("when the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits").[1] See also *Bloemsma v Auto Club Ins Ass'n,* 174 Mich App 692, 697; 436 NW2d 442 (1989) (a "dispute of priority among insurers will not excuse the delay in making timely payment").

Here, Esurance paid on a very significant no-fault claim and later found evidence that the policy had been procured through fraud. (Ex. 1, pp 1-2.) Esurance obtained a judgment against both its insured and the injured person, declaring the policy "void *ab initio* for misrepresentation and fraud in the application for insurance." (Ex. 3, Esurance's Court of Appeals Appendix, p 69a.)[2] With no existing policy, the injured person should have looked to redress from the MAIPF. Esurance paid on the basis of a mistake, no different than the more typical equitable subrogation scenario where a carrier pays and then discovers a higher-in-priority in the claimant's household, for example. Yet Esurance has been denied any remedy.

MCR 7.305(C)(2)(a) empowers this Court to consider applications for leave to appeal from decisions of the Court of Appeals, so long as such applications are filed within 42 days after the Court of Appeals' order. MCR 7.305(B), in relevant part, requires that an application to this Court show that "the issue involves legal principles of major significance to the state's jurisprudence," or that "the decision is clearly erroneous and will cause material injustice…." MCR 7.305(B)(3) and (B)(5). This Application satisfies MCR 7.305(B)(3) and (B)(5) for reasons noted above, and explained in more detail below.

---

[1] Overruled on other grounds by *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 203 n 24; 895 NW2d 490 (2017).
[2] See *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018).

DATE AND NATURE OF THE ORDER APPEALED FROM

Esurance seeks leave to appeal the October 17, 2019 decision of the Court of Appeals, which affirmed the dismissal, under MCR 2.116(C)(8), of Esurance's equitable subrogation suit against the MAIPF. As noted above, the MAIPF agrees that the Court of Appeals' decision presents "a legal issue of significant public interest," and "establishes a critical new rule of law." (Ex. 2, pp 1-2.)

RELIEF SOUGHT

Esurance respectfully requests that its Application for Leave to Appeal be granted, and that it be allowed to appeal the Court of Appeals' October 17, 2019 decision.

In the alternative, Esurance respectfully requests that this Supreme Court peremptorily reverse the Court of Appeals, and remand the case to the trial court for entry of an Order denying the MAIPF's Motion for Summary Disposition, and for further proceedings.

STATEMENT OF THE QUESTION PRESENTED

I. Did the trial court err in dismissing Esurance's equitable subrogation claim under MCR 2.116(C)(8), where it is undisputed that Esurance paid the no-fault claim of Roshaun Edwards, thereby stepping into his shoes, and where the rescission of Esurance's policy meant that Roshaun could have filed suit against the MAIPF under MCL 500.3174?

Defendants-Appellees answered	:	No.
The Circuit Court, Judge Allen, answered:		No.
The Court of Appeals answered:		No.
Plaintiff-Appellant Esurance answers:		*Yes.*

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On January 10, 2016, Roshaun Edwards was involved in a high-speed, single-vehicle motor vehicle accident while driving alone in a 2015 Dodge Challenger. (Ex. 3, p 30a.) On that date, Roshaun crashed the Dodge Challenger into a telephone pole in the City of Detroit. (Ex. 3, pp 53a, 62a.) At the time of the accident, Roshaun did not have insurance of his own and did not live with a resident relative who had insurance. (Id., pp 30a, 62a.) After the accident, Roshaun applied for PIP[3] benefits from Esurance as well as the MAIPF. (Id., pp 31a, 62a.)

At the time of the accident, the Dodge Challenger was solely owned and registered to Anthony Robert White, II. (Ex. 3, pp 31a, 71a-74a.) However, Mr. White did not obtain the security required for that vehicle by MCL 500.3101. (Id., p 31a.) The only insurance covering the vehicle was a *Colorado* Esurance policy purchased by Luana Edwards-White. (Id.) Esurance issued that policy to her based on her representation that the 2015 Dodge Challenger was owned by her and garaged in Colorado. (Id.) In investigating Roshaun's no-fault claim, Esurance learned that Luana Edwards-White was not the registrant or owner of the Dodge Challenger, and that the vehicle had been garaged in Michigan. (Id.)

Based on Luana Edwards-White's fraud and misrepresentation, Esurance filed a Declaratory Judgment Action seeking to rescind the Colorado policy it had issued to her. (Ex. 3, p 31a.) Esurance also named Roshaun as a defendant in that action. (See Id., p 69a.) That action resulted in an March 20, 2017 Order stating that the policy issued to Luana Edwards-White was void *ab initio* for fraud and misrepresentation in the application for insurance. (Ex. 3, pp 31a,

[3] "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute. … However, lawyers and others call these benefits PIP benefits to distinguish them from property protection insurance benefits." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66 n 4; 737 NW2d 332 (2007).

69a.) But by the time Esurance established Ms. Edwards-White's fraud, it had paid $571,265.42 on Roshaun's PIP claim. (Ex. 1, p 2; Ex. 3, p 31a.)

A few months after the ruling on rescission, Esurance filed this action, seeking to recover the no-fault benefits it paid on behalf of Roshaun under an equitable subrogation theory. (Ex. 3, p 54a.) Roshaun had previously applied for no-fault benefits from the MAIPF, but the MAIPF never assigned a servicing insurer. (Ex. 3, pp 43a, 54a, 62a.) Prior to any discovery, the MAIPF moved for summary disposition under MCR 2.116(C)(8), suggesting that it was not an entity that could be sued and alternatively, that no recognized legal theory allowed Esurance to recover against it. (Id., p 19a.) In response, Esurance clarified that its claim was one for "equitable subrogation," meaning that "Esurance acquired all the rights and claims of Roshaun Edwards" when it paid no-fault benefits on his behalf. (Id., p 53a.) Esurance cited case law recognizing such claims in the no-fault context. (Id.)

The trial court heard Defendants' motion on June 29, 2018 and granted it as follows:

> …The Court hears Esurance's argument, it has some merit on a conceptual basis, I follow it.
>
> But … the Court doesn't believe that the law permits it, nor is the Court inclined under equitable principles to adopt the relief that's being requested.
>
> And at the end of the day Esurance wants to step in the shoes of Roshaun Edwards to enforce what may have been his rights against the MAIPF, the Court has to look at two issues to get there.
>
> And one is does such a right exist under the current Michigan law, and then if so what right can be enforced, and this Court doesn't believe we really get past the first question.
>
> The MAIPF's positions is that no such right exist under the current state of Michigan law since the Legislature draft its specific statutes with the No-Fault Act, and this Court declines to read into the statute a provision allowing this action because it would violate the principle and the fancy legal term, *expressio unius est exclusio*

> *alterius*…. The express mention of one thing and the statute implies the exclusion of other similar things.
>
> And there are express rights of subrogation, indemnification, reimbursement within the no-fault statute, but none that contemplate reimbursement by MAIPF as Esurance is requesting in this case.
>
> The Legislature must have intended to exclude this right from statute, had the Legislature intended for no-fault insurers such as Esurance to have a right of subrogation against other parties such as MAIPF in situations like this, as limited as it may be, the Legislature would've enacted a statute authorizing same, leave it at that.
>
> And the Court doesn't believe that there are any cases on point supporting Esurance's argument. For those reasons and as fully set forth in MAIPF's brief the Court … grant[s] the motion…. (Ex. 3, pp 14a-16a.)

Esurance appealed by right. On October 17, 2019, the Court of Appeals affirmed. The panel did not agree with the reasoning of the trial court, nor did the panel wholly adopt the MAIPF's arguments. (Ex. 1, pp 2-5.) Rather, the panel took issue with the timing of the rescission and how that relates to the basic nature of subrogation (where the insurer is standing in the shoes of the person it paid benefits for). (Id., p 5.) The panel agreed with Esurance that rescission voids the policy "*ab initio*" – i.e., as if it never existed. (Id.) But the panel noted that "if plaintiff [Esurance] wishes to proceed against defendants under the premise that there never was an applicable insurance policy, … then plaintiff must also be held to that state of affairs." (Id.) The panel further explained that if "the claim for equitable subrogation proceeds under the premise that the policy never existed, then plaintiff had no obligation to pay PIP benefits on Roshaun's behalf"; "[a]s a mere volunteer, plaintiff cannot seek equitable subrogation." (Id., p 6.)

The panel ultimately found that the issue could only be looked at one of two ways:

> Either the equitable subrogation claim must be analyzed under the circumstances that existed when benefits were paid, which was before the policy was rescinded, or it must be looked at through the lens that the policy never existed in the first place. If the policy exists, plaintiff's claim of equitable subrogation fails as a matter of law because Roshaun could not have pursued benefits from defendants under MCL 500.3172(1). If the policy never existed, then plaintiff was a mere volunteer when it paid $571,000 in PIP benefits. In either case, plaintiff's equitable subrogation claim fails as a matter of law. (Id.)

The problems with this reasoning are (1) an insurer is never a mere volunteer when it pays "in ignorance of the real state of facts, or under an erroneous impression of one's legal duty,"[4] and (2) equitable subrogation is always problematic in this context because at the moment the injured person is paid by the first insurer, the injured person has no claim for benefits, so the subrogee carrier would have no rights to inherit vis-à-vis the other insurer.

STANDARD OF REVIEW

There are two standards of review applicable to this Application for Leave to Appeal. The first standard of review relates to whether the Application should be granted. As noted above, one of the criteria for granting Supreme Court applications is where a decision of a lower court is clearly erroneous and, if not reviewed and reversed, will result in material injustice. MCR 7.305(B)(5). This standard is met for reasons explained below. Another one of the criteria for granting Supreme Court applications is where "the issue involves legal principles of major significance to the state's jurisprudence." MCR 7.305(B)(3). Esurance and the MAIPF both seem to agree that this standard is met here. (See Ex. 2.)

[4] *Fed Ins Co v Hartford Steam Boiler Inspection & Ins Co*, 415 F3d 487, 494–95 (CA 6, 2005).

The second standard of review relates to the actual decision of the court below that is the subject of the Application. The decision of the Court of Appeals was to grant the MAIPF's Motion for Summary Disposition, which had been brought under MCR 2.116(C)(8). (Ex. 1, p 1.) Decisions to grant or deny motions for summary disposition under this subpart are reviewed on appeal *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Where the standard of review is *de novo*, appellate courts should not consider themselves "bound to any degree by the opinions of the [lower court] on questions of law." Martineau, *Fundamentals of Modern Appellate Advocacy* (Rochester, NY: Lawyers Cooperative Publishing, 1985), § 7.27, p 138. See also *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café*, 441 Mich 110, 115-116; 490 NW2d 337 (1992), noting that the term *de novo* has been defined as "anew; afresh; again; a second time; once more; in the same manner, or with the same effect."

"*De novo* review is sometimes referred to as 'plenary review,' no doubt because it allows the court to give a full, or plenary, review to the findings below." Beazley, *A Practical Guide to Appellate Advocacy*, (New York: Aspen Law & Business, 2002), § 2.3.1(b), p 15. Courts applying this standard "look at the legal questions as if no one had as yet decided them, giving no deference to any findings made below." *Id.* "When this standard is applied, the reviewing court is permitted "to substitute its judgment for that of the trial court…." *Id.*

ARGUMENT

I. The lower courts erred in dismissing Esurance's equitable subrogation claim where it is undisputed that Esurance paid the no-fault claim of Roshaun Edwards, thereby stepping into his shoes, and where the rescission of Esurance's policy meant that Roshaun could have filed suit against the MAIPF under MCL 500.3174. The Court of Appeals' reasoning – which emphasized "the circumstances that existed when benefits were paid" – would undermine all such claims in the no-fault context, as it fails to account for the fact that equitable subrogation is a flexible legal fiction.

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Maiden*, 461 Mich at 119. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* A motion under (C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden*, 461 Mich at 119. "When deciding a motion brought under this section, a court considers only the pleadings." *Id.* at 119-120, citing MCR 2.116(G)(5).

Michigan courts have repeatedly recognized that when a no-fault carrier mistakenly pays no-fault benefits, where another entity was obligated to pay the benefits in the first place, the insurer that has made the payments has a claim for reimbursement in the form of subrogation. See *Fed Kemper Ins Co v W Ins Companies,* 97 Mich App 204, 208–09; 293 NW2d 765 (1980), finding that when an insurer "whose liability is arguably secondary to that of a primary insurer, pays the claim, it becomes subrogated to the rights of the insured." "Under these circumstances the Court held that a separate suit … is the preferable method of handling the dispute since the injured person recovers for his injuries without delay while the insurers thereafter iron out their respective liabilities." *Id.*

Equitable subrogation is "a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies

of the other." *Auto-Owners Ins Co v Amoco Prod Co,* 468 Mich 53, 59; 658 NW2d 460 (2003). "The doctrine of subrogation rests upon the equitable principle that one, who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect." *Tel Twelve Shopping Ctr v Sterling Garrett Constr Co,* 34 Mich App 434, 439; 191 NW2d 484 (1971), quoting *French v Grand Beach Co,* 239 Mich 575, 580; 215 NW 13 (1927).

"Equitable subrogation is a flexible, elastic doctrine of equity." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). "Subrogation" denotes "two different kinds of rights, those that are transferred in effect by way of contractual assignment and those that arise by operation of law from the relations of various involved parties under equitable principles." *Citizens Ins Co of America v Buck*, 216 Mich App 217, 225; 548 NW2d 680 (1996). Although caution is indicated, "the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability." *Hartford Accident & Indemnity*, 461 Mich at 216 (citation omitted). It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer." *Auto-Owners v Amoco*, 468 Mich at 59. However, "[w]hen an insurance provider pays expenses on behalf of its insured, it is not doing so as a volunteer." *Id.* (citation omitted).

"The nature of the claim asserted by the subrogee is determined by the nature of the claim that the subrogor would have had." *Id.* A subrogee "stands in the insured's shoes and assumes all legal rights of the insured." *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 277

n 2; 597 NW2d 235 (1999). "Consequently, it makes no difference to [the] analysis that [an] action is brought by the insurer/subrogee instead of the insured." *Id.*

Here, it is undisputed that Roshaun timely notified the MAIPF of his claim, yet the MAIPF declined to assign a servicing insurer. (Ex. 3, pp 43a, 54a, 62a.) Under MCL 500.3174, Roshaun – with no other insurance available to him, the Esurance policy having been rescinded[5] – therefore had a right to sue the MAIPF:

> A person claiming through the assigned claims plan shall notify the Michigan automobile insurance placement facility of his or her claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The Michigan automobile insurance placement facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. **An action by the claimant** shall not be commenced more than 30 days after receipt of notice of the assignment or **the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim,** whichever is later. MCL 500.3174 (emphasis added).

Here, the MAIPF argued that Esurance's claim should be dismissed because no provision of the No-Fault Act expressly authorizes such suits. (Appx 6a.) Although the Court of Appeals did not decide the case on this basis, the argument warrants some attention because the trial court seemingly found it persuasive, and Esurance may assert it as an alternate basis for affirming. This Court rejected a nearly identical argument in *Auto-Owners v Amoco,* 468 Mich at 63. There, this Court "recognize[d] that the WDCA contains an 'exclusive remedy' provision applicable to

[5] This case was dismissed prior to *Bazzi,* 502 Mich at 390. Admittedly, *Bazzi* would – had Roshaun or the insured answered the complaint for rescission – have called for a "balancing of the equities" before the rights of an "innocent third-party" such as Roshaun could be terminated by Esurance's rescission. However, the MAIPF has waived any such argument for the purposes of the summary disposition record; at Paragraph 3 of its Motion the MAIPF accepted that Esurance's policy was "fairly and legally rescinded" and "void *ab initio*." (Ex. 3, p 19a.)

the employee," but held that "its existence does not prevent plaintiff from seeking to recover under a theory of equitable subrogation, which is separate and independent of the remedies contained in the WDCA." *Auto-Owners v Amoco*, 468 Mich at 63 (emphasis added). Equitable subrogation is, likewise, "separate and independent of the remedies contained" in the No-Fault Act. The critical inquiry is what remedies *Roshaun Edwards* would have had against the MAIPF. *Travelers*, 235 Mich App at 277 n 2. As noted, Roshaun gave timely notice to the MAIPF and therefore could have sued under MCL 500.3174.

At various points in this proceeding, the MAIPF has floated the idea that it is not a legal entity that can be sued (Appx 6a, 13a.) and therefore, § 3174 only contemplates an "action" against the insurer that has been assigned the claim, as opposed to the MAIPF itself. Not so. Recent case law is replete with examples of the MAIPF or its predecessors being sued, and those suits being resolved without any reference to the MAIPF's status as a supposedly non-suable entity. See *Detroit Med Ctr v Michigan Prop & Cas Guar Assn*, 501 Mich 857; 900 NW2d 624 (2017); *Saleh v Michigan Assigned Claims Facility*, 483 Mich 886; 759 NW2d 881 (2009); *Bronson Healthcare Group, Inc v Michigan Assigned Claims Plan*, 323 Mich App 302, 303; 917 NW2d 682 (2018); *WA Foote Mem Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159, 170 (2017), lv pending 501 Mich 1079; 911 NW2d 470 (2018); *Shinn v Michigan Assigned Claims Facility*, 314 Mich App 765, 776; 887 NW2d 635 (2016); *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 298 Mich App 192, 195; 826 NW2d 197 (2012). Indeed, the MACP[6] was not only sued, but filed a cross-complaint and actively participated in *Michigan*

[6] The interplay between the MAIPF and the MACP is explained by the Defendants in the amicus curiae brief they filed in *Dye v Esurance Prop & Cas Ins Co*, 501 Mich 944; 904 NW2d 620 (2017). (Ex. 3, pp 96a-98a.)

Head & Spine Ins v MACP, unpublished opinion per curiam of the Court of Appeals, issued November 13, 2018 (Docket No. 339766) (Ex. 3, p 79a).

Moreover, interpreting § 3174 to allow suits only against insurers *that the MAIPF has assigned claims to* would leave claimants without a remedy in cases such as this, where the MAIPF declines to assign an insurer. This would be contrary to the remedial purpose of the No-Fault Act. See *Turner v Auto Club Ins Ass'n,* 448 Mich 22, 28; 528 NW2d 681 (1995) (stating the liberal rule of construction applicable to the No-Fault Act, i.e., "[t]he [no-fault] act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it").

In finding that no cause of action exists in these circumstances, the trial court erred by placing unwarranted emphasis on the canon of statutory construction known as *expressio unius est exclusio alterius.*[7] (Ex. 3, pp 7a, 10a, 15a.) Again, this is not an argument that the Court of Appeals adopted, but some discussion of it is necessary because it was central to the MAIPF's position. The trial court reasoned that because the No-Fault Act expressly authorizes certain types of subrogation claims, but does not mention equitable subrogation claims against these Defendants, this reflects a legislative intent to bar such claims. (Ex. 3, pp 7a, 10a, 15a.) This is not only irreconcilable with this Court's reasoning in *Auto-Owners v Amoco,* 468 Mich at 63, but is also a misapplication of this canon. As the U.S. Supreme Court noted in *Barnhart v Peabody Coal Co,* 537 US 149, 168; 123 S Ct 748, 760 (2003), "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items

[7] "[T]he expression of one thing means the exclusion of another…." *Tuggle v Dept of State Police,* 269 Mich App 657, 663; 712 NW2d 750 (2005).

expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence."

"The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Id.* (citations omitted). The rule "properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference." *Id.* (citations omitted).

Here, the No-Fault Act does not contain a list or grouping of subrogation claims. Rather, the MAIPF identified five discrete subparts, spread throughout the No-Fault Act. (Ex. 3, pp 23a-24a.) Those subparts – MCL 500.3115(2), MCL 500.3116(3), MCL 500.3146, MCL 500.3175(2), and MCL 500.3177(1) – each refer to distinct factual situations (except for § 3146, which establishes a statute of limitations for claims under § 3116) and there is no "natural association of ideas" between them, other than the extremely broad idea that they all relate to one party asking for money from another. The No-Fault Act contains no "associated group or series" of subrogation claims.

The doctrine of *expressio unius est exclusio alterius* "does not subsume the plain language of the statute when determining the intent of the Legislature." *Tuggle,* 269 Mich App at 664. It is "a rule of statutory interpretation meant to help ascertain the intent of the Legislature, and it does not automatically lead to results." *Id.* (citation omitted). In *Luttrell v Dept of Corr*, 421 Mich 93, 107; 365 NW2d 74 (1984), this Court found that the doctrine was simply inapplicable where the Legislature's intent was otherwise clear from, among other things, "the plain language of the statute" and "the rule of avoiding absurdity and unreasonableness…." That

reasoning applies here, where (1) *Roshaun Edwards* had a cause of action against the MAIPF under MCL 500.3174, (2) there is no express prohibition of equitable subrogation claims in the No-Fault Act, (3) the MAIPF's position would leave claimants without a remedy when the MAIPF refuses to assign their claims, contrary to the remedial purpose of the Act, and (4) this Court's reasoning in *Auto-Owners v Amoco,* 468 Mich at 63 suggests that equitable subrogation "is separate and independent of the remedies contained in" the statute. So the Court of Appeals correctly rejected the trial court's application of this doctrine. (Ex. 1, p 4.)

What is also notable about this claim is that even if Esurance had not rescinded the policy, Esurance simply did not fall within the order of priority for Roshaun's claim under a plain reading of MCL 500.3114. (Ex. 3, pp 55a-56a.) "In 1973, the Michigan Legislature adopted the no-fault insurance act, MCL 500.3101 et seq." *McCormick v Carrier,* 487 Mich 180, 189; 795 NW2d 517 (2010). "The act created a compulsory motor vehicle insurance program under which insureds may recover directly from their insurers, without regard to fault, for qualifying economic losses arising from motor vehicle incidents." *McCormick,* 487 Mich at 189. In first-party no-fault cases, priority among potentially responsible insurers is governed by MCL 500.3114(1). This provision creates a general rule that persons injured in a motor vehicle accident look to their own insurance first. *Michigan Mut Ins Co v Farm Bureau Ins Group,* 183 Mich App 626, 630; 455 NW2d 352 (1990).

"Normally, a person who sustains an accidental bodily injury in a motor vehicle accident must first look to no-fault insurance policies in his household for no-fault benefits." *Id.* "No-fault policies in the household are first in order of priority of responsibility for no-fault benefits, regardless of whether the injured person was, or was not, an occupant of a motor vehicle at the time of the accident." *Id.* Only when "there is no policy in the injured person's household" do

claimants look to "other insurers." *Id.* "[I]t is the policy of the no-fault act that persons, not motor vehicles, are insured against loss." *Lee v DAIIE,* 412 Mich 505, 509; 315 NW2d 413 (1982). It is "the purpose of the no-fault act" that "individuals will insure their own personal protection with their own no-fault policies. They will first look to their own insurer before having to rely on whether any other party involved has insurance to cover their losses." *Madar v League Gen Ins Co,* 152 Mich App 734, 741; 394 NW2d 90 (1986). The Legislature "intended that injured persons who are insured … for no-fault benefits would have primary resort to their own insurer." *Corwin v DaimlerChrysler Ins Co,* 296 Mich App 242, 262; 819 NW2d 68 (2012).

Here, Esurance did not insure Roshaun, his spouse, or anyone residing in his household. The named insured under Esurance's *Colorado* policy was Luana Edwards-White – and there is no indication in the record that Roshaun lived with her at any times relevant to this claim. (See Ex. 3, pp 55a-56a.) Since Esurance's insured did not reside in Roshaun's household, MCL 500.3114(1) did not place Esurance in the order or priority. So Roshaun's claim would fall to "[t]he insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a) (emphasis added). Again, "the owner or registrant of the vehicle occupied" was Anthony White II, and Esurance was not his insurer. This subpart is keyed to the *person* ("the insurer of the owner or registrant"), not the *vehicle*. See *Dobbelaere v Auto Owners,* 275 Mich App 527, 533-534; 740 NW2d 503 (2007). So we look next to MCL 500.3114(4)(b), "[t]he insurer of the operator of the vehicle occupied." Again, this was Roshaun, and Esurance was not his insurer. *The MAIPF did not dispute this in the trial court.* (Ex. 3, pp 75a-78a.)

This priority analysis confirms that Esurance paid Roshaun's claim in error and undeniably would have an equitable subrogation claim against the correct insurer, if one existed. See *Titan Ins v N Pointe Ins,* 270 Mich App 339, 343-344; 715 NW2d 324 (2006). The only

thing different about this case is that there is no *insurer* for Esurance to sue. But that is because the MAIPF did not assign an insurer. Again, recent case law is filled with examples of claimants suing the MAIPF to compel an assignment. See *Bronson Healthcare Group,* 323 Mich App at 304; *Bronson Methodist Hosp,* 298 Mich App at 195–196. So some kind of cause of action clearly exists and dismissal with prejudice under MCR 2.118(C)(8) was, at best, premature.

And the Court of Appeals erred in affirming that dismissal. The panel found that "[i]f the policy never existed" – again, because it was voided *ab inito* – "then plaintiff was a mere volunteer when it paid $571,000 in PIP benefits." This is incorrect. A "volunteer" has been defined as "one who intrudes himself into a matter which does not concern him, or one who pays the debt of another without request, when he is not legally or morally bound to do so, and when he has no interest to protect in making such payment." *DAIIE v Detroit Mut Auto Ins Co,* 337 Mich 50, 53-54; 59 NW2d 80 (1953). But a "payment is not voluntary when made under compulsion, under a moral obligation, in ignorance of the real state of facts, or under an erroneous impression of one's legal duty." *Id.* at 54. That is precisely what happened here – Esurance issued a policy and made payments based on "ignorance of the real state of facts" *because of the insured's material misrepresentations* in the application for insurance. (See Ex. 3, p 69a.) Again, the Macomb County Circuit Court declared the policy "void *ab initio* for misrepresentation and fraud in the application for insurance." (Id.) So at the time Esurance paid, it was ignorant of the "real state of facts" (that the policy was fraudulently procured and subject to rescission) and "under an erroneous impression" that it had a legal duty to cover Roshaun's PIP benefits. See *Fed Ins Co,* 415 F3d at 494–495. As such, Esurance "was not a volunteer, and its claim for equitable subrogation" should proceed. *Id*. at 495.

The Court of Appeals alternatively found that "under the circumstances that existed when benefits were paid, which was before the policy was rescinded," Esurance's claim fails "because Roshaun could not have pursued benefits from defendants under MCL 500.3172(1)." (Ex. 1, p 6.) But this is a fundamental problem with every no-fault subrogation claim. The panel's reasoning fails to account for "flexible" and "elastic" nature of the remedy. *Hartford Accident & Indemnity*, 461 Mich at 215. In any subrogation suit for PIP benefits, the insurer has to pay in order to step into the shoes of the injured person and gain standing to sue the higher-in-priority insurer that the person should have looked to. But if the injured person's bills have been paid, then he theoretically has nothing to sue the other carrier for "under the circumstances" then existing. This is why equitable subrogation is referred to as a "legal fiction"; Michigan courts have historically looked past this in the no-fault context in order to achieve fairness and give protection to carriers that pay promptly and later find new information.

CONCLUSION AND RELIEF REQUESTED

The lower courts erred in dismissing this action. Both the MAIPF and the lower courts fundamentally misapprehended the nature of equitable subrogation. By paying insurance benefits on behalf of Roshaun, Esurance stepped into his shoes. Roshaun would have had a right to sue the MAIPF under MCL 500.3174. While the No-Fault Act may not expressly endorse such a cause of action, that does not negate Esurance's claim. A "theory of equitable subrogation … is separate and independent of the remedies contained in the" Act. *Auto-Owners v Amoco*, 468 Mich at 63. And while the MAIPF seemed to suggest that they are not suable entities, both § 3174 and case law belie this. Although the Court of Appeals affirmed on grounds that differed from those of the MAIPF and the trial court, the Court of Appeals' finding that Esurance was a volunteer is contrary to *DAIIE v Detroit Mut Auto,* 337 Mich at 53-54, as Esurance issued a

policy and made payments based on "ignorance of the real state of facts" *because of the insured's material misrepresentations* in the application for insurance. And the Court of Appeals' alternative view, which focused on "the circumstances that existed when benefits were paid," threatens to remove equitable subrogation from no-fault jurisprudence entirely – eliminating this important mechanism for providing "assured, adequate, and prompt recovery" for losses "arising from motor vehicle accidents."[8] For these reasons, Esurance respectfully requests that this Honorable Supreme Court grant that Application for Leave to Appeal or in the alternative, that this Court peremptorily reverse the decision of the Court of Appeals and remand to the Wayne County Circuit Court for further proceedings.

SECREST WARDLE

BY: _/s/Drew W. Broaddus_____
DREW W. BROADDUS (P 64658)
Attorney for Plaintiff-Appellee Esurance
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
(616) 272-7966 / FAX (248) 251-1829
dbroaddus@secrestwardle.com

Dated: November 26, 2019

[8] *St John Macomb-Oakland Hosp*, 318 Mich App at 267.

INDEX OF EXHIBITS

Exhibit 1	*Esurance v MAIPF*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2019 (Docket No. 344715)
Exhibit 2	MAIPF's Request for Publication of Court of Appeals opinion
Exhibit 3	Esurance's Court of Appeals Appendix